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IN THE

Supreme Court of the United States

October Term, 1981

IN RE STATE OF MISSOURI, et al.,

Petitioners,

—v.—

UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF ARKANSAS and the HONORABLE CHARLES W. BAKER, et al.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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This brief replies to respondents' new contentions. They argue that the issue of a bankruptcy court's jurisdiction to bar a state from enforcing its grain laws in its own courts because of the bankruptcy of a warehouseman was rendered "moot" by respondents' issuance of recent orders for the sale of the grain. Petitioners contend that this issue was necessarily kept alive by the provision of respondents' own orders of sale that expressly transferred all grain ownership claims from the grain to the proceeds of its sale. Res. Br., pp. 5, 13, A-76, A-84.* No contrary authority has been cited by respondents.

Respondents next urge that certiorari should be denied because petitioners did not seek relief in the bankruptcy court

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* References beginning with the prefix "Res. Br." are to respondents' brief in opposition including its appendices. References to "Pet." are to petitioners' petition for a writ of certiorari and its appendices. Petitioners' supplemental brief is referred to as "Supp. Br."

after losing in the Eighth Circuit. Res. Br., pp. 8-11, 16. This "exhaustion of remedies" theory does not apply where the inferior tribunal lacks subject matter jurisdiction. Nor do respondents cite any supporting authority.

Finally, based on the lower court's incorrect premise that the Missouri grain laws are "insolvency" and liquidation laws, Pet., p. A-15, and that as such they conflict with the federal bankruptcy laws, respondents contend that the bankruptcy court's jurisdiction is supreme and bars state court proceedings to enforce grain laws. They also contend that the bankruptcy court had jurisdiction over this grain because of its jurisdiction over the property of the debtors. Res. Br., pp. 18-21. Those contentions, advanced in opposition to a grant of certiorari, also lack merit.

The Eighth Circuit found that only a "minute" portion of the grain was property of these estates, Pet., p. A-11; virtually all of the grain (97.7%) was owned by third parties. Any controversies did not involve the debtors or their property but concerned competing ownership and lien claims of third parties. The bankruptcy courts have no jurisdiction over those disputes. The 1978 bankruptcy legislation preserved the historic power of governments to enforce police or regulatory enactments, such as grain laws, Pet., p. 16, in non-bankruptcy courts.

The Missouri grain law is not an "insolvency" law

Respondents urge that federal bankruptcy laws supersede state receivership proceedings. Res. Br., pp. 18-20. They contend that the Missouri grain law is an "insolvency" law providing for liquidation of warehousemen, and that as such it was preempted by the federal bankruptcy laws. Res. Br., pp. 18-19. The lower court so ruled. Pet., p. A-15. Those conclusions are based on a misunderstanding of the grain law and its section dealing with enforcement. § 411.519 RSMo1978, at Pet., pp. 4-6. Two different types of enforcement proceedings are authorized by § 411.519. One provides for the state's *seizure* of the grain. §§ 411.519.1(4) and 411.519.2. The second authorizes the state court's appointment of a receiver to "operate or liquidate" if a warehouseman is insolvent or

unable to satisfy the claims of all depositors. § 411.519.6. Petitioners' action filed on October 20, 1980 was for seizure (unlike their August 1980 receivership proceedings).

Section 411.519 RSMo1978 deals with "Insufficient inventory", as stated by its caption. Pet., p. 4. Respondents acknowledge that there were "substantial shortages of grain in [the debtors' Missouri warehouse] elevators". Res. Br., p. 2. Petitioners' actions pursuant to § 411.519 were taken in the public interest to deal with grain shortages. Liquidation of the warehousemen's own assets (i.e., plant and equipment) was not their object. Explicit distinction is drawn by the Missouri grain statute between a "*seizure or receivership* action filed under this section". § 411.519.7. (Italics added). Seizure is authorized without regard to solvency or insolvency. However, seizure and receivership are both statutory remedies to deal with inventory shortages. Neither is for liquidation of a warehouseman's own property. Insolvency of the warehouseman may be only coincidentally involved because inventory shortages and insolvency usually coincide. The Missouri grain law therefore, provides means to protect the ownership of grain in the event of shortage; it is not an insolvency law to liquidate insolvent warehousemen's own assets. *Perez* v. *Campbell*, 402 U.S. 637 (1971), a classic preemption case, does not apply in these circumstances as observed in *In re Grand Spaulding Dodge, Inc.*, 5 B.R. 481, 486 (N.D. Ill. 1980).

The issues are not "moot" despite the grain sale

The issues in this case are alive. The bankruptcy court's own memorandum directing the grain sales recognized that applicable state law could compel those claiming the ownership of grain deposited with a warehouseman "to take a money satisfaction" in lieu of their ownership interests. Res. Br., p. A-76. The proceeds of the grain sales thus stand in the place, and are the equivalent, of the grain itself. In the event of a reversal, petitioners' state court enforcement proceedings thus would become the forum of dispute resolution with respect to the proceeds of sale, the monetary equivalent of the previously stored grain; ownership and distribution would be determined pursuant to Missouri law. Cf., *Butner* v. *United States*, 440 U.S. 48 (1979). Any doubt is laid to rest by the provision of

respondents' order of sale that "all ownership claims [shall] attach to the net sale proceeds". Res. Br., p. A-84. This explicit provision independently establishes state court jurisdiction over the proceeds.

It can also be expected that substantial charges for administrative services would be made in the bankruptcy proceedings against the proceeds of the grain sales, Res. Br., pp. A-77-78, that could exceed several million dollars, Pet., p. A-50. A reversal would save those substantial sums for the grain owners. On that basis alone the case is not moot.

There is a basic conflict between a bankruptcy court's paramount interest to protect *creditors'* rights and that of state tribunals and authorities to protect *property owners'* interests; respondents' confused notion that the grain *owners* are "creditor claimants", Res. Br., pp. A-75-76, underscores the difference in their orientation. Respondents' out of focus view of mootness led to their contention that a reversal would accomplish nothing for "any creditor" because the bankruptcy trustee "is already doing what petitioners seek to do". Res. Br., p. 17. Their contention fails to recognize the distinction between owners and creditors.

The serious conflict in federal-state relations in this case is a reason for deciding the issues on the merits despite the sale of the grain. This Court has entertained cases on their merits because of such a conflict and its impact on bankruptcy administration. *Callaway* v. *Benton*, 336 U.S. 132, 136 (1949).

Considerations of federalism call for a high threshold test to determine mootness. "The seriousness of federal judicial interference with state civil functions has long been recognized by this Court". *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 603-04, *reh. denied*, 421 U.S. 971 (1975). This Court has also indicated that "the rightful independence of state governments" requires that federal courts "scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined". *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202, 212 (1971), *reh. denied*, 404 U.S. 1064 (1972). See also, *Younger* v. *Harris*, 401 U.S. 37, 44 (1971).

The claim of mootness is particularly lacking in merit when tested against petitioners' governmental interest that can be

vindicated for the public good only by a reversal of the erroneous decision below. Petitioners have an overriding governmental interest to ensure the reliability and integrity of the comprehensive Missouri grain warehouse regulation system, so that grain depositors and purchasers may rely both on warehouse laws and warehouse receipts, without being subjected to "highly questionable claims" [*Matter of Cartridge Television, Inc.*, 535 F.2d 1388, 1391 (2d Cir. 1976)] made in protracted and costly litigation in the bankruptcy courts. Cf., *Nicholas* v. *United States*, 384 U.S. 678, 682 (1966).

Indicia of a live controversy

The presence of any one of the following criteria has been held to preclude a finding of mootness:

1. The existence of a live dispute precludes treating a case as moot. *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 537-38 (1978); *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85, 86-87, n. 1 (1977); *Super Tire Eng. Co.* v. *McCorkle*, 416 U.S. 115, 120-27 (1974); *Gilligan* v. *Morgan*, 413 U.S. 1, 5 (1973); *Powell* v. *McCormack*, 395 U.S. 486, 518 (1969). For example, a controversy is not mooted merely because of the sale of one piece of property where there is an immediate prospect that the dispute may erupt as to other property. *Linmark Associates, Inc.* v. *Township of Willingboro*, *supra*, 431 U.S. at 86-87, n.1. The controversy in the present case now involves the proceeds as much as it formerly involved the grain. It has spilled over to the proceeds.

2. Although *one* issue in a case has become moot, the case nevertheless remains alive if *other* issues have not become moot. *University of Texas* v. *Camenisch*, ____ U.S. ____, 68 L. Ed.2d 175, 179 (1981); *Powell* v. *McCormack*, *supra*, 395 U.S. at 496. The appeal in this case challenges the Eighth Circuit's judgment sustaining respondents' jurisdiction, not respondents' order for the sale of the grain. The issues differ. Since a reversal would effectively shift the sale proceeds to the state court, this case is not moot. Cf., *Matter of Combined Metals Reduction Co.*, 557 F.2d 179, 194-95 (9th Cir. 1977) (sale did not moot the issue over confirmation of a reorganiza-

tion plan because a reversal would have had "some effect on the proceedings below"); *Matter of King Resources Co.*, 651 F.2d 1326, 1332 (10th Cir. 1980).

The courts have also recognized a sharp distinction between funds belonging to the estate which a bankruptcy trustee has the right to control and those that are not a part of the estate over which state officers have the right to exercise sole control. *In re Teltronics, Ltd.*, 649 F.2d 1236, 1239 (7th Cir. 1981), Supp. Br., p. 5. It was there held that, despite a bankruptcy, jurisdiction over funds obtained by the bankrupt's fraud was vested exclusively in a state court under the control of a non-bankruptcy consumer fraud receiver.

3. Issues capable of repetition but which might otherwise evade review generally have been viewed as live. *Vitek* v. *Jones*, 445 U.S. 480, 487 (1980); *Gerstein* v. *Pugh*, 420 U.S. 103, 110 (1975); *United States Parole Com'n* v. *Geraghty*, 445 U.S. 388, 398 (1980). The jurisdictional issue in this case will no doubt arise again if not now resolved on the merits. However, if the grain sale is held to have mooted the jurisdictional issue, then all future cases could also be deemed moot and the issue never reach this Court.

4. Mootness does not exist where third parties might be unable by themselves effectively to assert their rights but which may be vindicated if the subject action is permitted to proceed. For that reason it has been held that termination of the interest of an individual plaintiff in a class action while the action is pending does not render the class claims moot; therefore, the individual plaintiff may appeal from a denial of class certification even though he has no individual interest. *Deposit Guaranty Nat. Bank* v. *Roper*, 445 U.S. 326, 337-39, *reh. denied*, 446 U.S. 947 (1980); cf., *United States Parole Com'n* v. *Geraghty, supra*, 445 U.S. at 396-97; *Sosna* v. *Iowa*, 419 U.S. 393, 402, n. 11 (1975); *Gerstein* v. *Pugh, supra*, 420 U.S. 103, 110, n. 11. See also, *Eisenstadt* v. *Baird*, 405 U.S. 438, 444-46 (1972); *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 459-60 (1958); *Barrows* v. *Jackson*, 346 U.S. 249, 257, *reh. denied*, 346 U.S. 841 (1953), which apply a high threshold test for mootness.

The present case involves the assertion of rights by petitioners for two purposes. First, through their enforcement proceeding in the state court, they seek to establish reliability for the grain warehouse regulatory scheme. Second, they seek to protect the rights of a large group of grain depositors who otherwise might be economically unable to protect their own rights. The attorneys' fees incurred by a litigant could exceed the amount of the judgment he might obtain. *Deposit Guaranty Nat. Bank* v. *Roper, supra,* 445 U.S. at 338, n.9.

The policy underlying the presumption against mootness in class litigation protecting the rights of sizeable group is equally applicable to the present case. Although Missouri's enforcement proceeding was not technically a class action, its goal was substantially the same as though it were. The Missouri Department of Agriculture attempted to bring the ownership controversies into the state court so that the rights of the hundreds of grain depositors and receipt holders, Pet., p. A-51, could be effectively and economically adjudicated and the grain (or the proceeds of its sale) distributed to its rightful owners, in accordance with applicable state property law and uninfluenced by the concern for creditors of debtor warehouse companies held by those involved in bankruptcy administration.

5. Where "any relief" is possible following a reversal, mootness has been found not to exist. *Gilligan* v. *Morgan, supra,* 413 U.S. at 5; *Powell* v. *McCormack, supra,* 395 U.S. at 517-18; *Mills* v. *Green,* 159 U.S. 651, 653 (1895). In the event of a reversal here, there would be a turnover to the state court of any unsold grain and all cash proceeds from the sale of the grain. The state court would adjudicate all controversies under applicable law. Relief would be complete.

Bankruptcy courts lack super-review jurisdiction

If permitted to stand, the Eighth Circuit's decision would enable bankruptcy courts to exercise a veto power over governmental action affecting debtors in bankruptcy in furtherance of the goals of bankruptcy law and administration without regard to the purposes of police and regulatory enactments enforced by governmental entities generally. The bankruptcy courts thus would be invested with super-review powers over a

broad spectrum of actions of governmental agencies responsible for implementing important and diverse policies unrelated to creditors' rights and as to which the bankruptcy courts would not ordinarily have the experience and qualifications possessed by the state and local agencies having jurisdiction. Since governments at all levels could lose various enforcement powers against debtors because of the mere advent of bankruptcy, the implications of the Eighth Circuit's decision are far-reaching. Congress never intended to create such a massive role for the bankruptcy courts in supersession of the well-established jurisdiction of state courts "simply because an interested party is involved in a bankruptcy proceeding". *Butner* v. *United States, supra,* 440 U.S. at 54-55. State courts, bankruptcy courts and governmental units throughout the nation require this Court's guidance as to the scope of the bankruptcy courts' jurisdiction to preclude state court enforcement proceedings.

Petitioners had no obligation to seek relief from respondents

Respondents urge that certiorari be denied on the ground that petitioners did not seek relief or exhaust their remedies in the bankruptcy court before or after the Eighth Circuit's judgment was entered. Res. Br., pp. 8-12. However, petitioners' very claim has been that the bankruptcy court lacked subject matter jurisdiction under 28 U.S.C. § 1471 and that that court was therefore powerless to act in respect of grain not owned by the estate.

This Court has stated that bankruptcy courts cannot administer property that, as here, "never became a part of the bankruptcy estate". *Pearlman* v. *Reliance Ins. Co.*, 371 U.S. 132, 136 (1962). Accord, *Callaway* v. *Benton, supra,* 336 U.S. at 142-43, 150. In addition, bankruptcy courts, as all other federal courts, have only such jurisdiction as is conferred upon them by statute. *Owen Equipment and Erection Co.* v. *Kroger,* 437 U.S. 365, 374 (1978). There is even a presumption that a federal court has no jurisdiction "unless the contrary affirmatively appears". *Grace* v. *American Central Ins. Co. of St. Louis,* 109 U.S. 278, 283 (1883).

In essence, respondents assert that their lack of subject matter jurisdiction was cured by petitioners' recent declination

to seek relief in the bankruptcy court and also by petitioners' early participation in the bankruptcy proceedings; they also urge that participation as a ground to deny review. These contentions fail for two reasons:

First, it is settled law that jurisdiction of a federal court, in this case the bankruptcy court, cannot be conferred by the consent of the parties. *American Fire & Casualty Co.* v. *Finn,* 341 U.S. 6, 17-18, n. 17 (1951). Nor can a federal court acquire jurisdiction by estoppel. *Mahoney* v. *Northwestern Bell Telephone Co.,* 377 F.2d 549 (8th Cir. 1967). Even an actual appearance and participation in the case by a party cannot confer subject matter jurisdiction that does not otherwise exist. *Rhode Island* v. *Massachusetts,* 37 U.S. 657, 719 (1838).

Second, governmental departments are entitled to the issuance of extraordinary writs against lower courts for the very purpose of confining them to the exercise of their lawful jurisdiction. Governmental officers are not required to risk contempt or submit themselves to the exercise of excessive jurisdiction in order to test the scope of a lower court's powers. *Ex Parte Republic of Peru,* 318 U.S. 578 (1943); *Schlagenhauf* v. *Holder,* 379 U.S. 104, 111 (1964); *La Buy* v. *Howes Leather Co.,* 352 U.S 249, 259-60, *reh. denied,* 352 U.S. 1019 (1957); *In re Attorney General of United States,* 596 F.2d 58, 63-64 (2d Cir.), *cert. denied,* 444 U.S. 903 (1979).

Thus, petitioners were under no duty to seek any relief from the bankruptcy court. That court's lack of subject matter jurisdiction over all but a minute portion of the grain, coupled with the federal-state jurisdictional conflict that erupted into confrontations between barricading farmers and United States Marshals, Pet., p. A-5; Res. Br., pp. 5-6, made this case an appropriate one for determination in a prohibition proceeding and makes it alive for review now.

Respondents failed to address 28 U.S.C. § 1471

Respondents failed to address petitioners' principal substantive contention that the bankruptcy courts lack subject matter jurisdiction under 28 U.S.C. § 1471—the basic provision conferring jurisdiction on the bankruptcy courts—to bar state court enforcement proceedings. In effect, by arguing that a reversal would "avail petitioners of nothing" because of Bank-

ruptcy Code § 105(a)'s provision authorizing bankruptcy courts to "issue any order . . . that is necessary or appropriate to carry out the provisions of" title 11 of the United States Code, respondents underscore the fact that they have failed to address the basic jurisdictional question. Section 105(a) does not confer any subject matter jurisdiction as such and thus does not advance respondents' position. If it should be determined that the bankruptcy courts are without jurisdiction under 28 U.S.C. § 1471, then they would be powerless to issue any order under § 105(a). In short, § 105(a) is a source of power only in a case in which a bankruptcy court otherwise has jurisdiction. For this reason, the authorities cited at pages 20-21 of respondents' brief are inapposite. Respondents' claim that the bankruptcy court "clearly has jurisdiction over all the *debtors'* property under § 1471" (Italics added) has no application because it fails to deal with the fact that virtually none of the grain was ever the property of the debtors. This case for a writ of prohibition is a live and important controversy.

CONCLUSION

For the reasons set forth above and in their Petition and supplemental brief previously filed with this Court, petitioners respectfully request that this Court issue a writ of certiorari and reverse the Eighth Circuit's judgment.

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